

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Changes to the Board of Directors of  
the National Exchange Carrier  
Association, Inc.;

Federal-State Joint Board  
on Universal Service

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DOCKET FILE COPY ORIGINAL

) CC Docket No. 97-21  
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) CC Docket No. 96-45  
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COMMENTS  
OF THE  
UNITED STATES TELECOM ASSOCIATION

**I. INTRODUCTION**

The United States Telecom Association ("USTA") hereby submits comments supporting the petitions for reconsideration of the Commission's above-captioned order of October 8, 1999 (the "*Order*").<sup>1</sup> The *Order* directly affects USTA's members, the vast majority of which are service providers that participate in the Schools and Libraries Program. Because of the substantial period of time that has elapsed since USTA and other parties petitioned the Commission to reconsider the *Order*,<sup>2</sup> USTA takes this opportunity to refresh the record regarding the petitions.

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<sup>1</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291 (rel. Oct. 8., 1999).

<sup>2</sup> USTA, Sprint Corporation ("Sprint"), and MCI WorldCom, Inc. ("WorldCom") filed petitions for reconsideration of the *Order* ("petitions") on November 8, 1999. The Commission placed the petitions on public notice in July 2000. See *Correction*, FCC Public Notice, Report

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As advocated in its Petition for Reconsideration, USTA continues to urge the Commission to reverse its determination to require service providers to reimburse the Universal Service Administrative Company (“USAC”) for the repayment of funds disbursed in violation of the statute.<sup>3</sup> As USTA demonstrated in its petition, the authorities on which the *Order* relies do not apply because (a) the universal service fund (“USF”) does not consist of federal funds associated with the Treasury, and (b) USAC, which administers the USF, is not an agent of the federal government. Moreover, the *Order* violates the Takings and Due Process clauses of the Fifth Amendment to the Constitution under the Supreme Court’s analysis in *Eastern Enterprises v. Apfel*.<sup>4</sup>

## **II. THE FUNDS FOR WHICH THE ORDER SEEKS RECOVERY ARE NOT FEDERAL FUNDS, AND USAC IS NOT A FEDERAL AGENCY**

A fundamental premise of the *Order* is that the Commission has no discretion to waive recovery of overcommitments of universal service funds that violate the Communications Act. The *Order* bases this conclusion on *OPM v. Richmond* and the Debt Collection Improvement Act (“DCIA”).<sup>5</sup>

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No. 2425 (rel. Jul. 24, 2000).

<sup>3</sup> On February 1, 2000, a group of carriers and carrier trade associations submitted a detailed *ex parte* presentation supporting the petitions for reconsideration. See letter from John W. Hunter, USTA, to Magalie Roman Salas, FCC, CC Docket Nos. 97-21, 96-45 (Feb. 1, 2000) and attachments (“February 1 *ex parte*”). AT&T Corp., CommNet Cellular, Inc., the Competitive Telecommunications Association, WorldCom, Nextel Communications, Sprint, and USTA presented the February 1 *ex parte*.

<sup>4</sup> 524 U.S. 498 (1998) (“*Eastern Enterprises*”).

<sup>5</sup> See *Order* at paras. 7 (citing *OPM v. Richmond*, 496 U.S.414 (1990)) and 10 (citing DCIA, 31 U.S.C. §§ 3701 *et seq.*). The *Order* also refers to the Commission’s Rules, which it has the authority to waive. See *id.* para. 10.

As USTA's petition for reconsideration and the February 1 *ex parte* show, these authorities apply only to payments of money from, or debts and claims owed to, the U.S. Treasury. Universal service funds do not fit into this narrow category of Treasury funds.<sup>6</sup> Contributions to the USF are not taxes, because the amounts collected are not available for general governmental purposes.<sup>7</sup> More broadly, in 1997 the U.S. Senate voted in favor of a statement (the "Dorgan Amendment") which explained the "sense of the Senate" that the federal government "should not manipulate universal support payments to balance the federal budget."<sup>8</sup> The Dorgan Amendment held that universal service contributions "are administered by an independent, non-federal entity and are not deposited into the Federal Treasury and therefore [are] not available for Federal appropriations."<sup>9</sup>

The USF does not consist of "federal funds" for federal budget purposes. The Office of Management and Budget defines the "federal funds group" as:

moneys collected and spent by the Government through accounts other than those designated as trust funds. The Federal funds group includes general, special, public enterprise, and intragovernmental funds.<sup>10</sup>

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<sup>6</sup> See USTA petition at 3, February 1 *ex parte* at 6 n.9.

<sup>7</sup> See, e.g., *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988), *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 428 (5<sup>th</sup> Cir. 1999), *cert. granted sub nom. GTE Service Corp. v. FCC*, 120 S.Ct. 2214 (2000).

<sup>8</sup> 143 Cong. Rec. S8213 (daily ed. Jul. 29, 1997).

<sup>9</sup> *Id.* at S8214. Cf., *Varney v. Warehime*, 147 F.2d 238 (6<sup>th</sup> Cir. 1945) (Assessments on milk sellers and handlers that were used to fund regulation of milk distribution are not "public funds" for purposes of the Appropriations Clause of the Constitution).

<sup>10</sup> See OMB Circular A-11 § 20.3 (2000), available at <http://www.whitehouse.gov/omb/circulars> ("OMB Circular A-11"). See also *The Budget System and Concepts and Glossary, Fiscal Year 2001*, Executive Office of the President, at 18, available at <http://w3.access.gpo.gov/usbudget/fy2001/pdf/concepts.pdf> ("Budget System Glossary").

The USF does not satisfy this definition of federal funds.

The USF is not a general fund, which includes “accounts for receipts that are not earmarked by law for a specific purpose, proceeds of general borrowing, and the expenditures of these moneys.”<sup>11</sup> Universal service funds are devoted to specific universal service purposes, and the funds collected for these purposes are directly related to the funds distributed. Of course, it is USAC, not the federal government, that collects universal service funds, and the contributors are telecommunications service providers, not the general public. Nor is the USF a “special fund” for federal budget purposes. A “special fund” is defined as a “federal fund account for receipts and/or offsetting receipts earmarked for specific purposes and an account for the expenditure of these receipts.”<sup>12</sup> Most special funds are derived from taxes, fines, or other compulsory payments, and special funds must be appropriated before they can be collected and spent.<sup>13</sup> The USF is not a special fund because it does not involve the designation of money collected by the federal government. As already explained, USAC, not the federal government, collects and disburses the funds in the USF.<sup>14</sup>

As discussed more fully below, USAC is not a government agency, nor is it a “public enterprise,” like the Postal Service. Therefore, the USF does not qualify as “intragovernmental

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<sup>11</sup> See OMB Circular A-11 § 20.3.

<sup>12</sup> See *id.* §§ 20.3, 20.11(b).

<sup>13</sup> See *id.* § 20.11(b).

<sup>14</sup> Although the USF has appeared in the federal budget, neither the Telecommunications Act of 1996 nor federal budgetary principles compel this result, and USTA is not certain of the reason for such inclusion. Among other things, the U.S. Treasury never holds the USF. As such, inclusion in the federal budget is not a reason for labeling the USF to be federal funds.

funds” or “public enterprise funds.” As a result, the USF does not satisfy the federal budgetary definition of federal funds.<sup>15</sup>

USAC itself is not a federal agency, or an agent or instrumentality of the federal government. USAC is an independent, non-governmental corporation created to administer the USF in a neutral manner. Administration of universal service historically has been the responsibility of the telecommunications industry, subject to regulation by the Commission and the states. Although the Telecommunications Act of 1996 established national universal service principles and made the process more explicit than previously, it did not take universal service administration away from the private sector.

Accordingly, the Commission adopted a proposal by the National Exchange Carrier Association (“NECA”), which had been administering USF, to create USAC as a wholly owned subsidiary of NECA to serve as a neutral Universal Service Administrator. NECA formed USAC as a private, not-for-profit Delaware corporation.<sup>16</sup> The federal government holds no interest in USAC, and federal officials do not serve as USAC’s directors, officers, or employees. Nor does USAC perform governmental functions. The Commission has expressly prohibited USAC from performing such governmental tasks as making policy or interpreting statutes, the Commission’s rules, or congressional intent.<sup>17</sup> Rather, USAC performs the types of universal service

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<sup>15</sup> Nor does the USF satisfy the definition of “deposit fund” which are moneys held by the government (a) temporarily, until ownership is determined or (b) as an agent for others. *See* OMB Circular A-11 §20.3.

<sup>16</sup> *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 12 FCC Rcd 18400, 18418 (1997).

<sup>17</sup> *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, 25067 (1998).

administration that the telecommunications industry historically has done for itself, subject to regulation.

USAC is not an agent or an instrument of the U.S. government. To be so considered, a corporation must be specifically authorized by Congress to further governmental objectives and must be controlled by the government.<sup>18</sup> USAC meets neither of these conditions as the courts have developed them. For this purpose, an entity furthers governmental objectives when it performs a function that the government otherwise would perform itself.<sup>19</sup> Congress did not specifically authorize USAC, and USAC has assumed the universal service administration function that traditionally has been a private sector activity. Nor does the U.S. government “control” USAC as required to establish it as a government agent or instrumentality. While USAC operates under Commission regulation and subject to Commission oversight, such regulation does not reach the level of government control that would be needed for USAC to be a federal agency. The Supreme Court has held that “extensive regulation by the government does not transform the actions of the regulated entity into those of the government.”<sup>20</sup> The Commission does not exercise the control over USAC sufficient for USAC to be considered an agent or instrumentality of the federal government.

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<sup>18</sup> See *Lebron v. Nat’l Railroad Passenger Corp.*, 513 U.S. 374, 383-390, 397-399, 400 (1995); Government Corporation Control Act, 59 Stat. 597, 602, 31 U.S.C. §§9101, 9102 (prohibiting creation of new government corporations without specific authorization by law).

<sup>19</sup> See *Lebron*, *supra*, 513 U.S. at 383-385, 397-399 (holding that Amtrak is an agent or instrumentality of the United States because it fulfills the governmental purpose of preserving rail transportation). See also *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 544-545 (1987) (holding that the U.S. Olympic Committee is not a government agent because the enabling legislation only authorized it to coordinate activities that always had been performed by private entities).

<sup>20</sup> See *San Francisco Arts & Athletics*, *supra*, 473 U.S. at 544.

Because the funds at issue are not federal funds and USAC is not a federal agency, *OPM v. Richmond* and DCIA do not limit the Commission's discretion in administering and collecting these funds.

### **III. THE ORDER VIOLATES THE TAKINGS AND DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT TO THE CONSTITUTION**

The petitions for reconsideration and the February 1 *ex parte* demonstrate that the *Order* is fundamentally unfair in its retroactive imposition of a repayment obligation on service providers. Indeed, the *Order* is so unfair and intrusive that it is unconstitutional under the standards of the Supreme Court's 1998 *Eastern Enterprises* decision. That decision struck down a clause of a federal statute governing companies' liability for health benefits for coal miners that it found to be so fundamentally unfair as to be unconstitutional.

In *Eastern Enterprises*, the Court considered the application of a requirement of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") to Eastern Enterprises ("Eastern"), a firm that had once operated coal mines but had left that industry in 1965. Under that requirement, Eastern was liable for the future health benefits of over 1,000 retired coal miners

The Court struck down the portion of the Coal Act in question by a 5-4 margin. Four members of the majority found that the requirement constituted a taking in violation of the Fifth Amendment. One member of the majority found that the clause violated substantive due process under the Fifth Amendment.<sup>21</sup> The takings analysis of *Eastern Enterprises* considered three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the

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<sup>21</sup> In concurring on substantive due process grounds, Justice Kennedy found that the challenged Coal Act requirement is "far outside the bounds of retroactivity permissible under our law," 524 U.S. at 550, because it creates prospective liability, *i.e.*, ongoing health benefit payments, for events that occurred 35 years before.

regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action.

Under the three-factor test of *Eastern Enterprises*, the *Order* is constitutionally infirm. With respect to the first factor,<sup>22</sup> the policy enunciated in the *Order* places a significant and indeterminate prospective financial burden on service providers that participate in the Schools and Libraries Program. Service providers that participate in the Schools and Libraries Program will not be able to limit their liability, since it is determined solely by the actions of USAC and the schools and libraries that service providers serve. These actions may have taken place months or years in the past. As to the second factor,<sup>23</sup> regarding the service providers' reasonable investment-backed expectations, it is clear that prior to the *Order*, service providers had absolutely no expectation, investment-backed or otherwise, that they would be liable for benefits improperly granted to schools and libraries. Under the *Order*, service providers that participate in the Schools and Libraries Program will not be able to control the potential burdens which they could expect to face, since the actions of others determine the extent of those burdens.

In considering the third factor, the plurality found that:

[When Congress] singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.<sup>24</sup>

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<sup>22</sup> In *Eastern Enterprises*, the Coal Act placed a \$50 million - \$100 million obligation on Eastern. The plurality noted that the Coal Act did not prohibit Eastern from seeking indemnification from the firms to which it had sold its mining interests, but noted that the Act did not confer any right of reimbursement.

<sup>23</sup> In considering the second factor in *Eastern Enterprises*, the plurality found that the Coal Act substantially interferes with Eastern's reasonable investment-backed expectations, since the Act reaches back 30 to 50 years to impose liability based on Eastern's activities between 1946 and 1965.

<sup>24</sup> 524 U.S. at 537.

The petitions for reconsideration and the February 1 *ex parte* demonstrate that the *Order* inequitably imposes liability on service providers for the improper activities of others.<sup>25</sup> This is especially the case when the service provider is held liable even though (a) it is obligated to participate in the subsidy program, (b) the Commission has established no rules for the recovery of allegedly unlawful payments, (c) USAC, not the service provider, has determined the eligibility of the subject applicant, (d) the service provider has had no notice of any deficiency or ineligibility of the subject applicant, and (e) the true beneficiary of the allegedly unlawful payment is the subject applicant, not the service provider.<sup>26</sup> By singling out service providers as liable for actions unrelated to their activities, the *Order* fails the three-part test of *Eastern Enterprises*.

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<sup>25</sup> See, e.g., MCI petition at 3-7; USTA petition at 5-8; February 1 *ex parte*, Attachment I at 1-2.

<sup>26</sup> See USTA petition at 5.

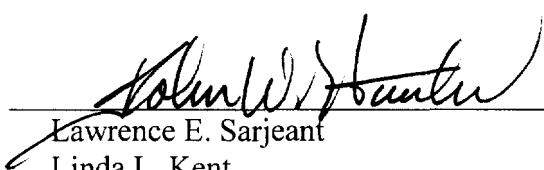
#### IV. CONCLUSION

The Commission should move expeditiously to reconsider the *Order* consistent with the petitions, the February 1 *ex parte*, and these comments. To do so will eliminate the major inequities and constitutional infirmities of the *Order*.

Respectfully submitted,

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August 3, 2000

**CERTIFICATE OF SERVICE**

I, Meena Joshi, do certify that on August 03, 2000, Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the the attached service list

  
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